85-273

Supreme Court, U.S.
FILED
AUG 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

STATE OF FLORIDA,

Petitioner,

vs.

ROBERT ROSS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT.

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QUESTION PRESENTED

WHETHER BY REJECTING AS UNREASONABLE, AND NOT IN GOOD FAITH, A DETECTIVE'S RELIANCE UPON A JUDICIALLY AUTHORIZED SEARCH WARRANT, BECAUSE A WORD PROCESSOR FAILED TO COPY HIS AFFIDAVIT'S DESCRIPTION OF THE PROPERTY ONTO THE WARRANT, THE FLORIDA DISTRICT COURT OF APPEAL INCORRECTLY CONSTRUED U.S. V. LEON, 468 U.S. ___, 104 S.Ct. 3405 (1984) AND MASSACHUSETTS V. SHEPPARD, 468 U.S. ___, 104 S.Ct. 3424 (1984)?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Florida petitions for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida, Fourth District.

OPINIONS BELOW

The decision of the District Court of Appeal of the State of Florida, Fourth District, was rendered on June 19, 1985. State v. Ross, ____So.2d____, 10 F.L.W. 1527 (Fla. 4th DCA 1985), it is reproduced in the Appendix, page A-1- A-2.

BASIS FOR INVOKING JURISDICTION

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was rendered on June 19, 1985. This petition is timely filed within sixty days of that date, pursuant to Rule 20.1, Rules of the Supreme Court of

the United States.

Jurisdiction is invoked pursuant to 28 USC § 1257(3).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A detective applied for a warrant to search a residence under construction for air-conditioning equipment and a water heater which had been stolen from the victim's construction site. The victim had summoned the detective to the uncompleted residence after he had seen

his missing equipment through an open window of the structure. The victim had been told he might find his equipment at that place by an unidentified individual.

The affidavit that was prepared was in all respects proper, including complete descriptions and serial numbers of the water heater and air conditioning equipment. The affidavit was prepared on a word processing machine in the detective's office. Normal office procedure was to prepare the search warrant on the word processing machine so that the exact language of the property description appeared on both the affidavit and on the search warrant. However, the search warrant, although containing an exact copy of the lengthy metes and bounds real property description, did not contain the language specifically describing the missing equipment by name and

serial number as contained in the affidavit. (A.3 - A.10).

Before presenting the affidavit and warrant to the issuing County Court Judge, the detective had the documents reviewed by the prosecutor's office. The detective then read the affidavit to the Judge, discussed the affidavit with him, and obtained the Judge's signature on the search warrant.

The detective returned to the uncompleted structure and read the search warrant fully to an adult relative of Respondent, explained the situation to this individual and left a copy of the search warrant with him. The detective did not attach a copy of his affidavit to the search warrant. The detective then executed the warrant and recovered the equipment which had been stolen from the victim's construction site.

The search warrant specifically described the real estate using both a metes and bounds description as well as a lot number and street address and commands the Sheriff (including the detective, who was a Deputy Sheriff), as follows:

> ...to there diligently search for: 1. any and all fruits or instrumentalities of the crime of Grand Theft, F.S. 812.014, including but not limited to a and any other property that constitutes evidence relevant to proving that a felony was committed (A. 13).

The trial court granted Respondent's Motion to Suppress. The State of Florida appealed to the District Court of Appeal of the State of Florida, Fourth District, which affirmed the order of the trial court.

The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

By holding that United States v. Leon, 468 U.S.___, 104 S.Ct. 3405 (1984) precludes resort by the State to the good faith exception to the exclusionary rule when there is a failure to particularize the things to be seized on the basis that the executing officer cannot, under such circumstances, reasonably presume the warrant to be valid, the District Court of Appeal, Fourth District has decided a Federal question in conflict with a decision of this Court, to wit, Massachusetts v. Sheppard, 468 U.S.____, 104 S.Ct. 3424 (1984).

In Massachusetts v. Sheppard, 468 U.S.____, 104 S.Ct. 3424 (1984), a detective applied for a warrant to search a residence for items relevant to a homicide investigation. In the instant case, Detective Pisani applied for a warrant to search a residence under

construction for a water heater and air conditioning equipment, items the theft victim had seen through a window and pointed out and described to the detective. In both cases the affidavits were in all respects proper. In Sheppard, the warrant that was issued mistakenly authorized a search for controlled substances. In the instant case the warrant which was issued failed to contain a list of the items to be seized. The warrant commanded Detective Pisani "to there diligently search for: 1, any and all fruits or instrumentalities of the crime of Grand Theft, F.S. 812.014, including but not limited to and any other property that constitutes evidence relevant to proving that a felony was committed." In both cases the detectives who executed the warrants were the same ones who prepared the affidavits. In the instant case the affidavit was

prepared on a word processing machine and the search warrant was prepared on the same machine so that there was less opportunity for error. Detective Pisani testified he relied upon the machine.

In Sheppard, the detective had been assured by the issuing judge that the errors on his warrant form had been corrected. In the instant case, Detective Pisani had the affidavit reviewed by the state attorney's office, and had discussed the affidavit with the county judge who signed the search warrant. In both cases the detectives believed their warrants authorized searches for the materials outlined in their affidavits.

In Sheppard, the trial court concluded that the circumstances presented an objectively reasonable basis for the officer's mistaken belief. This Court agreed. In the instant case both the trial court and the District Court of Appeal

have held that because the warrant failed to contain a description of the specific property on its face that Detective Pisani could not reasonably presume the warrant to be valid. These findings are clearly in conflict with this Court's opinion in Sheppard which is factually virtually identical. The District Court of Appeal incorrectly concluded that facial invalidity precludes resort by the state to the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S.____, 104 S.Ct. 3405 (1984).

Yet Leon was decided immediately prior to Sheppard. In Sheppard this Court agreed with the Massachusetts trial court that the search warrant was constitutionally invalid because the description in the warrant was completely inaccurate and the warrant did not incorporate the description contained in the affidavit.

However, this Court agreed with the Massachusetts trial court that "the police had acted in good faith in executing what they reasonably thought was a valid warrant."

In the opinion in Sheppard, this Court noted, at footnote 6., that:

> Detective O'Malley, the officer who directed the search, knew what items were listed in the affidavit presented to the judge, and he had good reason to believe that the warrant authorized the seizure of those items. Whether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. we hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested.

Contrary to this holding, the trial court and the Fourth District Court of Appeal held that Detective Pisani's

belief that the word processor had fully recopied the information contained in his affidavit onto the warrant, and his reliance upon the state attorney's review of the documents and the judge's review of the documents cannot be reasonable; and that the search he conducted pursuant to the warrant, for which he had provided information and therefor had no need to read in order to determine the subject matter of the search cannot fall within the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S.____, 104 S.Ct. 3405 (1984).

This holding is contrary to principles in Leon, i.e., deterent value.

As this Court concluded in Leon,

> [S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclsionary rule.

Detective Pisani knew exactly what he was looking for,as he even typed serial numbers on the affidavit. The issuing judge knew exactly what the detective was looking for, as he read and discussed the affidavit with him. Detective Pisani read the warrant to the defendant's brother and discussed it with him before entering the unfinished house with the victim to pick up the stolen items which the victim had kept a watch over from outside since discovering them. Clearly no deterrent purpose would be served by refusing to admit evidence gained by this search. In fact, there was no search, merely a seizure, as there was no need to search for the large bulky items. The only error on the part of the detective was in his reliance upon the ability of his word processor to completely copy all the information he had typed into it. To

quote this Court's opinion in Leon,

> In short where the officer's conduct is objectively reasonable,
>
> > excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should under the circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. Stone v. Powell, 428 U.S., at 539-540, 49 L.Ed 2d 1067, 96 S.Ct. 3037 (White, J., dissenting).
>
> This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.

Leon, supra, 82 L.Ed. 2d, at 697.

CONCLUSION

It must be remembered that the Fourth Amendment is meant to protect against unreasonable searches and seizures.

The State maintains that the actions of Detective Pisano did comport with the ultimate test of reasonableness and good faith under the Fourth Amendment. The Fourth District's analysis of the situation and it's findings that the detective acted in contravention of the Fourth Amendment is in error. The State respectfully submits that the detective's actions clearly show his good faith attempt to comply with the requirements of the Fourth Amendment. The District Court's rejection of the good faith exception in this case involves a substantial federal question which should be resolved by this Court, and respectfully requests that this Court grant its petition for writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1985

STATE OF FLORIDA,

Appellant

v. Case No. 84-2590

ROBERT ROSS,

Appellee.

_____/

Opinion filed June 19, 1985

Appeal from the Circuit Court for Indian River County; L. B. Vocelle, Judge.

Jim Smith, Attorney General, Tallahassee, and Robert S. Jaegers, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Tatjana Ostapoff, Assistant Public Defender, West Palm Beach, for appellee.

HERSEY, J.

We affirm the trial court's order suppressing evidence seized under a search warrant. Because of a word processing error the order failed to contain a

description of the specific property for which the search was authorized. Such facial invalidity precludes resort by the state to the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S.____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Indeed, the court in that case indicated that the exception should not be available where the warrant is facially deficient "in failing to particularize the place to be searched or the things to be seized" on the basis that the executing officer cannot, under such circumstances, "reasonably presume [the warrant] to be valid." 104 S.Ct. at 3422.

AFFIRMED.

ANSTEAD, C.J., and DELL, J. concur.

AFFIDAVIT FOR SEARCH WARRANT

IN THE COUNTY COURT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

BEFORE ME, Graham W. Stikelether, Jr., Judge of the County Court in and for the County of Indian River, State of Florida, personally came Perry M. Pisani, Deputy Sheriff and Detective for the Indian River County Sheriff's Department, Indian River County, Vero Beach, State of Florida, who after being duly sworn and states:

1. Affiant is now employed as a Detective with the Detective Bureau of the Indian River County Sheriff's Department of Indian River County for approximately 5 1/2 years. Affiant has conducted this investigation together with other members and sworn officers of the Indian River County Sheriff's Department.

2. Affiant based on the facts set forth in this affidavit has probable cause to believe and does believe that concealed in certain premises described below is certain evidence or property used in the commission of the crime of Grand Theft, F.S. 812.014, including but not limited to one (1) York Condenser Unit, Serial #HICCO24NM117895; one (1) A.D. Smith Hot Water Heater, Serial #ELJF-400910; and one (1) Square D Air Handler, Serial #5410308025EN279298, and any other property that constitutes evidence relevant to proving that a felony was committed. The said premises to be searched is described as:

A single story CBS dwelling under construction and apparently unoccupied located at the corner of 58th Avenue and 47th Street, Indian River County, Florida. Residence is

further described as having an exterior finish of unpainted cement block. The house has an uncompleted red brick chimney on top. The roof is covered with red-colored shingles and the trim of the house is white. The legal description of the house, according to Indian River County Planning and Zoning records is as follows: Indian River Farms Company subdivision Plat Book St. Lucie County 2 - Page #25 South half of West 536 feet of South ten acres of Tract 12, Section 21, Township 32, Range 39 East; Identification #21-32-39-00001-0120-00009.0, registered to Robert Mentoria ROSS, Post Office Box 1511, Vero Beach, Indian River County, Florida.

To arrive at said structure you

proceed West on State Road 60 from Vero Beach, Indian River County, Florida, to 58th Avenue also known as King's Highway. Turn right (North) and proceed to the intersection of 58th Avenue and 47th Street. The house is located on the Northeast corner of 47th Street and 58th Avenue on the abovelisted legal description. A blue mailbox located on 47th Street adjacent to the property displays the number 4710 - 58th Avenue, corresponding with the above legal description. Photographs of the above described dwelling are attached

3. The basis for affiant's probable cause is as follows: On 09-02-84 at 1954 hours, Mr. Duncan Bownian, Vice President of Laurel Homes of Vero Beach, Indian River County, reported that a model home

used as a sales office owned by Laurel Builders, Incorporated located at 4071-46th Street, Vero Beach, Indian River County, Florida, had been burglarized. A preliminary investigation by Deputy Sheriff Corporal William Reichert revealed that one (1) central air conditioning system which included an ait handler and condensing unit had been stolen. Also taken in the burglary was a hot water heater. The items are described as one (1) York Condenser Unit, Serial #HICCo24NM117895; one (1) A.O. Smith Hot Water Heater, Serial #ELJF-40910; and one (1) Square D Air Handler, Serial #5410308025EN279298.

On 09-05-84, Mr. Duncan Bowman contacted the Indian River County Sheriff's Department and requested a deputy to meet him at 46th Street and King's High-way. Deputy Bill Hunter arrived on-the-

scene. Mr. Bowman stated to Deputy Hunter that he had received information from Mr. Peter Robinson, Vice President of Laurel Homes, that the stolen items from 4071 - 46th Street were at a residence at 4710 - 58th Avenue, Vero Beach, Indian River County. Following up on the information, Mr. Bowman went to the above address and from 47th Street, in plain view, observed what he believed to be the air conditioning components stolen from the Laurel Homes Sales Office. He was able to recognize them by seeing similar cutting marks on copper tubing on the units which appeared to match those cutting markes found at the crime scene. The physical description of the items of what he saw also matched equipment which he had personally observed at the sales office prior to the items being stolen.

Your Affiant and Deputy Hunter also

observed the said items as well from 47th Street.

4. Wherefore, affiant prays that a search warrant be issued commanding that the Sheriff of Indian River County and/or duly appointed Deputies may request to assist him either in the daytime or in the nighttime or on Sunday as the exigencies of the occasion may demand or request to search the above described property and to seize as evidence any of the above mentioned fruits or instrumentalities of the crime of Grand Theft in violation of F.S. 812.014, and any other property that constitutes evidence relevent to proving that a felony was committed and person or persons arrested in connection therewith be brought before a magistrate or some other court having jurisdiction of the offense.

s/ Perry S. Pisani

Witness my hand and seal, this 5th day of September, 1984.

Sworn to and Subscribed
before me this 5th day
of September 1984.

/s GRAHAM W. STIKELETHER, JR.

This is to certify that this is a true and exact copy of the original document.

Witness my hand and seal, this 18th day of February A.D., 1985.

/s RENNEE DODGE
Notary Public
State of Florida
My Commission expires on
Dec. 20, 1987

IN THE COUNTY COURT IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

IN THE NAME OF THE STATE OF FLORIDA, TO ALL AND SINGULAR: THE SHERIFF of Indian River County, Florida, and his lawful deputies; all police officers in Indian River County, Florida; the Commissioners of the Florida Bureau of Law Enforcement or any of his constituted agents:

WHEREAS, complaint on oath and in writing supported by affidavit of a credible witness or witnesses has this day been made before me, the undersigned Graham W. Stikelether, Jr., Judge in and for Indian River County, Florida, and

WHEREAS, said facts made known to me and considered by me have caused me to certify and find that the facts setforth in said affidavit show and constitute probable cause for the issuance of this

warrant and the Court being satisfied of the existence of said grounds setforth in the affidavit and that the laws of the State of Florida regarding Grand Theft have been and are being violated on or in the following described property, to-wit:

A Single story CBS dwelling under construction and apparently unoccupied located at the corner of 58th Avenue and 47th Street, Indian River County, Florida. Residence is further described as having an exterior finish of unpainted cement block. The house has an uncomplete red brick chimney on top. The roof is covered with red-colored shingles and the trim of the house is white. The legal description of the house, according to Indian River County Planning and Zoning records is as follows: Indian River Farms Company Subdivision, Plat Book Saint Lucie County 2-Page #25 South half of West 536

feet of South ten acres of Tract 12, Section 21, Township 32, Range 39 East, Identification #21-32-39-00001-0120-00009.0, registered to Robert and Mentoria ROSS, Post Office Box 1511, Vero Beach, Indian River County, Florida. NOW, THEREFORE, you or either of you are hereby commanded with proper and necessary assistance in the name of the State of Florida, in the daytime or in the nighttime or on Sunday to enter said property hereinbefore specified to there diligently search for:

1. Any and all fruits or instrumentalities of the crime of Grand Theft, F.S. 812.014, including but not limited to a and any other property that constitutes evidence relevent to proving that a felony was committed.

You are further commanded, in the event that you seize any of the said property hereinbefore described, to

make up at the time and place of seizure a full, true and itemized list and inventory of all things seized and taken in duplicate, signed by you, and to then and there give and deliver the same within ten days of conducting the search before a magistrate or some other court having jurisdiction of the offense.

WITNESS my hand and seal this 5th day of September 1984

This is to certify that this is a true and exact copy of the original document.

WITNESS my hand and official seal, this 18th day of February, A.D. 1985.

/s Renee Dodge
Notary Public
State of Florida

My commission expires
Dec. 20, 1987